Bail Slip

The Appellant in Crl.A.No.388/99 Viz., 1.Pakkirisamy 2. Ravi, 3. Gandhi were directed to be released on bail as per order of this Court dated 15.6.1999 and made in Crl.M.P.No.3775/99.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.11.2006

CORAM:

THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

CRIMINAL APPEAL No.388 OF 1999

1.Pakkirisamy
2.Ravi
3.Gandhi ... Appellants/ Accused 1 to 3

Vs.

State, by the Inspector of Police,
Nannilam Police Station,
Nannilam. ... Respondent/ Complainant

Criminal Appeal preferred under Section 374 Cr.P.C., as against the judgment of conviction and sentence dated 26.4.1999, rendered in Sessions Case No.21 of 1999 by the learned Additional Sessions Judge, Nagapattinam.

* * *

For appellants : Mr.T.Sudanthiram, Senior Counsel
for Mr.V.Manokaran
For respondent : Mr.J.C.Durairaj,
Govt.Advocate (crl.side)

* * *

JUDGMENT

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The appellants, as accused, faced the trial in Sessions Case No.21 of 1999 on the file of the Additional Sessions Court, Nagapattinam, for the alleged offence under Section 307 IPC, whereas they were found guilty only under Section 326 IPC and sentenced each of them to undergo Rigorous Imprisonment for four years and to pay a fine of Rs.5000/= each in default to undergo further rigorous imprisonment for two months, which is impugned in this appeal by all.

2. On 11.10.1997, at about 2.15 a.m. (Night hours),

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according to the prosecution, all the accused, aiming the life of one Gopalakrishnan, assaulted him with patta knives, thereby caused multiple injuries and the acts of the accused should come within the meaning of Section 307 IPC. Thus alleging, a final report came to be filed, followed by committal, then at the satisfaction of the learned Sessions Judge, framing charges, questioning the accused, on their refusal to plead guilty, resulting trial, ending in conviction.

3.The brief facts, leading to this appeal:

(a) Thiru Ashok Kumar-P.W.1, Thiru Gopalakrishnan-P.W.3 and Thiru Stalin-P.W.4 are the residents of same place of Nannilam. Gopalakrishnan, brother-in-law of P.W.1 was the Secretary of Auto, Car Drivers Association. P.W.1 though belongs to Thiruvarur, staying with P.W.3, looking after his business.

(b) On 10.10.1997, P.Ws.1,3,4 and others have celebrated 'Ayuthapooja' and the function came to an end by 1.30 night i.e. early morning of 11.10.1997.

(c) For celebrating 'Ayuthapooja' festival, the association had printed pamphlets, in which the name of the first appellant was omitted to be included, though he was the Secretary of DMK, Nannilam, which was questioned by A.1, followed by wordy altercation, resulting strained relationship.

(d) After the 'Ayuthapooja' function was over at about 1.30 a.m., P.Ws.1,3 and 4 went to the house of P.W.3, in order to finalise the accounts of expenditure, for 'Ayuthapooja'. P.W.3 went 15' ahead, in order to open the door, followed by P.Ws.1 and 4. At that time, all the accused, armed with deadly weapons, attacked P.W.3 indiscriminately, aiming his life, which was witnessed by P.Ws.1 and 4. Because of the assault, P.W.3 not only lost one finger but also sustained many bleeding cut injuries, which caused him to fall unconscious. On seeing this, all the accused, under the hope P.W.3 died, left the place, which was witnessed by P.Ws.1 and 4 in the light, which was burning in the veranda, just in front of the house of P.W.7.

(e) After the accused left the scene of crime, P.W.1 took P.W.3 and admitted him in the Government Hospital, from where the matter was informed to the Police. When the police came to the hospital, P.W.1 preferred Ex.P.1 complaint, since P.W.3 was unconscious, unable to speak.

(f) On the basis of Ex.P.1 complaint, a case came to be registered in Cr.No.703 of 1997 on the file of Nannilam Police Station, by P.W.10, for which printed FIR-Ex.P.2 was sent to court immediately. Thereafter, P.W.10, rushing to the scene of crime, prepared observation

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mahazar-Ex.P.5, sketch-Ex.P.12 and recorded the statements of witnesses also.

(g) The Doctor-P.W.2, who treated P.W.3, at the first instance, and the Doctor-P.W.8, who had taken X-rays and the Doctor-P.W.9 who had further treated P.W.3, have given statements, to the Investigating Officer about the injuries sustained by P.W.3, under Exs.P.3 and P.4.

(h) The Investigating Officer also arrested the accused, and on the basis of the confession statement-Ex.P.7, he recovered the weapons-M.Os.1 and 2, under Ex.P.8. The recovered material objects were sent for chemical examination, which elicited Biology Report-Ex.P.14 and serology report-Ex.P.15. Obtaining opinion of the Doctor, regarding the injuries under Ex.P.11 and recording the statements of the witnesses then and there, the Investigating Officer, came to the conclusion that all the accused had aimed the life of P.W.3 and therefore, they should be dealt with under Section 307 IPC and in this way, as said above, a final report came to be filed, ending in conviction.

4. Heard Mr.T.Sudanthiram, the learned senior counsel for the appellants and Mr.J.C.Durairaj, the learned Government Advocate (criminal side) for the respondent/State.

5. The learned senior counsel appearing for the appellants attempted to assail the conviction and sentence slapped by the trial Court on the following grounds, viz.:

(i) that at the first instance, when the injured was taken to the hospital, it was stated, as if the assailants are two in number, whereas now three accused are charged, which would prove the falsity of the case;

(ii) that P.Ws.1 and 4 could not be the eye-witnesses and therefore, believing their oral testimony, convicting the accused/appellants, as did by the trial Court, may not be legally sound; and

(iii) that the person, who took the injured to the hospital has not been examined, which should be construed as fatal to the prosecution case, in addition to certain other minor points.

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6. Elaborating the above submissions, taking me through the oral evidence of the prosecution witnesses, as well as drawing my attention to the documents relied on by the prosecution, a sincere attempt was made by the learned senior counsel for the appellants to label the conviction and sentence, as if not supported by legal evidence, thereby praying for acquittal.

7. Heard the learned Government Advocate (criminal side) on

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the above points, who supported the case of the prosecution, adopting the reasons assigned by the learned trial Judge.

8. It is proved beyond all reasonable doubts, that P.W.3 sustained number of injuries in an incident, which took place on 11.10.1997 in the early hours viz. at 2.15 a.m. P.W.3 has spoken about the injuries sustained by him and its permanent disability, including loss of one finger. P.W.2 examined P.W.3 on 11.10.1997 at about 2.45 a.m. By examining him, as seen from Ex.P.3, P.W.2 had noticed all over the body of P.W.3, 12 cut injuries, as described in Ex.P.3 and they are:

(1) A cut injury measuring 8" x 2" x 1" on the right side of the head, adjacent to right ear;
(2) a cut injury measuring 3" x 1" x ½" on the back side of right ear;
(3) a cut injury having the dimension of 1" x ½" x ½" on the front side of right ear;
(4) a cut injury on the inner side of right fore arm measuring 4" x 1", exposing bones and tendens;
(5) a cut injury on the back side of right hand fingers;
(6) a cut injury on the right shoulder with the dimension of 4" x 1" x ½"
(7) a cut injury on the front side of right hand near elbow measuring 5" x 1" x 1", bone exposed.
(8) a cut injury on the out side of the right thigh measuring 8" x 2" x 2".
(9) A cut injury on the right shoulder measuring 3" x 2" x 1"
(10) a cut injury on the back side of the left hand involving all fingers and bones;
(11) four cut injuries over the back of right shoulder parallel in location, measuring 2" x ½" x ½" and
(12) a cut injury on inside of left lower part of the leg, measuring 3" x 1" x ½"

9. P.W.3 was referred to Tanjore Hospital, where he was subjected to further treatment. P.W.8, who is working in the x-ray department took x-rays for the injuries under M.O.7, which revealed the fractures, as disclosed in Ex.P.11, fracture in the right fore arm, thumb, index finger, fracture in the left thumb etc. On that basis, P.W.2 has given opinion that out of 12 injuries, injuries Nos.1,2,3,8,9,11 and 12 are simple in nature, whereas injuries No.4 to 7 and 10 are grievous in nature, as disclosed by Ex.P.3. When the Doctor has spoken about the injuries, noticed by him over the person of P.W.3 and their nature, they are not challenged by the defence. Thus, it is made out that the life of P.W.3 was aimed by the assailants, whoever they may be, and that is why, more or less, the assailants have butchered P.W.3, inflicting so many injuries, as detailed above, including severance of one finger also. Therefore, I do not find

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any doubt, that the accused should have aimed the life of P.W.3, though the trial Court has not accepted the same, whereas the accused have been convicted only under Section 326 IPC. The acquittal of the accused under Section 307 IPC is not challenged and therefore, ignoring my impression, based on the above injuries, now, I have to see, whether the injuries detailed in Ex.P.3 would have been caused by the accused, if so, whether the conviction and imprisonment slapped upon the accused are legally sustainable.

10. As spoken to by P.W.2 and as noted in Ex.P.3, it was reported to the Doctor, as if P.W.3 was assaulted by two known persons. But, three persons were charge-sheeted. Taking advantage of the entry available in Ex.P.3, being the earliest one, a submission was made by the learned senior counsel for the appellants, as if it is a false case, since when the parties had the opportunity to disclose the number of assailants, they have mentioned about the participation of only two accused. The law is now well settled that the entries made by the Doctor in the Wound Certificate cannot be taken as substantial evidence, since the Doctor is not expected to conduct an enquiry, regarding the assailants and their number etc. and their duty is to note down the injuries, including the weapons, if disclosed, wielded by the assailants, so as to verify whether injuries could have been caused by the weapons mentioned, then tallying the same with the weapon, if later recovered, during the investigation. In this view of the matter, taking advantage of the fact the Doctor has stated in Ex.P.3 "assault by two known persons", I am unable to lable the case as if a false one or fabricated one, creating any doubt, entitling the accused to get the benefits of the same also, that too considering the unimpeachable, formidable evidence available in this case, which I am going to discuss hereunder.

11. The submission of the learned senior counsel for the appellants, that P.Ws.1 and 4 could not have witnessed the incident, appears to be unacceptable, considering the way in which they have deposed about the incident, as well as prior activities before the incident viz. 'Ayuthapooja' festival, where orchestra was playing etc. It is not in dispute that P.W.3, though related to P.Ws.1 and 4, was involved in the 'Ayuthapooja' festival. It is the case of the prosecution, after the festival or the music-feast, P.Ws.1,3 and 4 went to the house of P.W.3, though it is night hours, to settle the accounts for the day, which appears to be probable and acceptable. The motive spoken also appears to be acceptable, since not seriously challenged, which was properly considered by the trial Court also.

12. By careful reading of the oral evidence of P.Ws.1 and 4

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and considering the injuries sustained by P.W.3, which is corroborated by medical evidence, I am unable to find any infirmity, warranting to disbelieve their oral testimony or to eclipse the same as unworthy of acceptance. P.Ws.1 and 4 have categorically deposed about the role played by all the three accused, while attacking P.W.3. Except some minor contradictions, which are bound to occur, nothing has been materially brought to surface, to eschew their evidence, as if they might not have witnessed the incident.

13. The submission of the learned senior counsel for the appellants, that non-examination of the person, who admitted P.W.3 in the hospital is fatal, appears to be flimsy, deserves only outright rejection. It is not mandatory that all the persons, who had seen or who hadconnected with the incident, should be examined, invariably. The duty of the Court is to test the veracity of the witnesses, who have been examined, to prove the offence. It is the prerogative of the prosecution, to choose the witnesses to prove the offence and it is not the duty of the Court to compel them to examine this witness or that witness. If the witnesses, who had been examined before the Court have given evidence to the satisfaction of the Court, bringing home the guilt of the accused, then it is the bounden duty of every Court to act upon the said evidence, invariably. In case, the witnesses, who have been examined are not trustworthy or not dependable, for the reasons to be recorded, on the basis of the answers elicited during the cross-examination, then only the Court will have the right to comment upon the non-examination of other witnesses, as if, even if they were examined, they would not have supported the case of the prosecution, then drawing the adverse presumption also. This latter part of the above observation is not available in this case, since in my considered opinion, by analysing the evidence, the oral evidence of P.Ws.1 and 4 is well dependable and there is no legal infirmity in accepting their testimony, which is supported by the evidence of injured person viz. P.W.3. Even assuming the worst, the oral evidence of P.Ws.1 and 4 is unacceptable, I do not find any reason to ignore the oral evidence of P.W.3, who is the sufferer at the hands of the accused, as spoken by him.

14. There cannot be any dispute about the competency of P.W.3 to speak about the incident, at whose hands he received the cut injuries etc. P.W.3 would state, in my opinion unquestionably also, about the grievance of the accused and the role played by each of the accused. He has stated that the first accused had grievance against him and he had also informed to others, since his name was not printed in the pamphlet for celebrating 'Ayuthapooja' festival. The said evidence was not challenged effectively and therefore, there is nothing wrong in

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saying, that the accused had the motive to assault P.W.3. P.W.3 would state, after the music feast is over, he went to his house along with his brother-in-law P.W.1, Stalin-P.W.4, Premkumar, Idayathulla, Parthiban and when they were nearing the house, he proceeded ahead, requesting others to follow him; that when he climbed the upstairs, turned towards his house portion, A.1 came there, attacked him proclaiming his death, followed by Gandhi-A.3 and Ravi-A.2. He has further stated, when the accused had assaulted him, he attempted to enter his house, but unable to do so because of the bolting, then, he ran towards the house of Saminathan-P.W.7 and A.2 assaulted him over his left thigh, right shoulder, right hand, using M.O.1 and that A.3 attacked him on the left shoulder, outer side of the left eye, resulting severing the ring finger. He has further stated that A.1 cut him over his right wrist, right shoulder repeatedly and over the knee also.

15. This evidence is fully corroborated by the oral evidence of P.Ws.1 and 4, which I need not repeat, since it is well considered by the trial Court. The injuries, so spoken by P.Ws.1,3 and 4, were noticed on the person of P.W.3 by P.W.2, as incorporated in Ex.P.3. Therefore, I have no doubt at all that P.W.3 sustained as many as 12 injuries only at the hands of the accused, out of which injury Nos.1,2,3,8,9,11 and 12 are simple in nature, whereas injuries No.4 to 7 and 10 are grievous in nature, as certified by the doctor, under Ex.P.3, not in dispute. If P.W.3 had not been treated timely, even there would have been possibility of death of P.W.3, which was prevented by timely medical treatment. However, the trial Court, not taking into consideration this aspect, probably taking some lenient view, without considering the gravity of the injuries and the permanent disability caused to P.W.3, convicted the accused only under Section 326 IPC, which cannot be set aside on any ground, as submitted by the learned senior counsel for the appellants.

16. Feeling and realising there is no escape, a last submission was made by the learned senior counsel for the appellants that at least, the sentence may be slashed to some extent, for which I am unable to concede, considering the conduct of the accused in attacking P.W.3 near his house in the upstairs varanda, causing 12 cut injuries, out of which five injuries viz. injuries No.4 to 7 and 10 are grievous in nature, as disclosed by Ex.P.3, that too using deadly weapons. Therefore, this kind of persons, who had more or less paralysed the life of P.W.3, causing some permanent disability also, are not entitled to be viewed leniently and in this view, the sentence also should be confirmed, as such, not warranting any disturbance.

17. In the light of the above discussion, the appeal is devoid of merits and the same is liable to be dismissed.

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18. In the result, the appeal is dismissed, confirming the conviction and sentence imposed by the Court of learned Additional Sessions Judge, Nagapattinam in Sessions Case No.21 of 1999, dated 26.4.1999.

19. The sentence imposed on the appellants was suspended by this Court as per the order dated 15.6.1999 made in Crl.M.P.No.3775 of 1999. Therefore, the appellants, who are on bail, are directed to surrender before the court concerned, to serve out the remaining period of sentence within 15 days, failing which the trial Court is directed to take appropriate steps for securing the appellant/accused, to serve out the remaining period of sentence. The appellants are entitled for set-off under Section 428 Cr.P.C.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

Rao

To
1.The Additional Sessions Judge,
Nagapattinam.

2. Do Thro The Principal Sessions Juge, Nagapattinam

3. The Judicial Magistrate, Thiruvarur.

4. do Thro The Chief Judicial Magistrate,
Nagai Quide Millate District.

5. The Superintendent, Central Prison, Cuddalore.

6.The Inspector of Police,
Nannilam Police Station,
Nannilam.

7.The Public Prosecutor,
High Court, Madras.

1 cc to Mr.T.Sudanthiram, Advocate, Sr. 58514

Crl.A.No.388 of 1999

TEJ (CO)
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